IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO. 6223 OF 2007

Sadashiv Atmaram Sawant & ors.... Petitioner

versus

Ganpat Shivaji Sawant & ors..... Respondent.

Shri S.A.Sawant for the petitioners.
Shri M.S.Karnik i/b.Ms. P.P.Tendulkar for respondent 1 to 5.
Shri S.D.Kadam for respondents 7 to 13 & 24 to 28.

CORAM; A.P. DESHPANDE, J.
DATED; 13TH SEPTEMBER, 2007

P.C. ;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The plaintiff instituted a suit for partition and separate possession in respect of house No.430 and other landed properties. The present writ petition concerns only the house property bearing no.430. The trial Court allowing the application moved by the plaintiff, granted temporary injunction restraining the present petitioners from carrying out the construction. Aggreived by the order passed by the trial Court, the present petitioners preferred an appeal before the District Judge. The District Judge has rejected the Misc. Civil Appeal and hence the

present petition has been filed.

3. Perusal of the photographs reveal that the construction of the house is in half way and has reached the lintel level. The present petitioners sometime in December 2006 obtained permission of the Grampachayat for repairs of the old structure, which was admittedly in possession of the petitioners, and which has been described as southern portion of house no.430 and after obtaining the permission, the present construction is being carried out.

4. Before the First Appellate Court, the counsel for the petitioners made a statement that the petitioners are ready to carry out the construction at their costs and risk and if and in case the plaintiff succeeds in the suit, the present petitioners will not claim, any equity on account of having spent money for construction of the house. It was also stated that as the petitioners are constructing the structure at their costs and risk, whatever shares would be ultimately determined on decision of the suit, the same could be alloted to the respective parties and the petitioners will not object to the same on the ground that the new construction has been erected at the cost of the petitioners. The said statement has not been accepted by the First Appellate Court by

observing thus:

> "It may be noted here that the oral submission to the effect that the shares to the parties would be given in the newly constructed house, if the trial court, at the conclusion of the trial, finds that the House No.430 is an ancestral property, has been canvassed, but no such undertaking has been given in writing. Tomarrow, the defendant nos. 1 to 9 may say that no such submission was ever made by their advocate while arguing the appeal and as such, they are not bound to give any share to the plaintiff and other defendants".

4. The First Appellate Court did not consider the undertaking given by the present petitioners through their counsel before the First Appellate Court solely for the reason that the undertaking was not tendered in writing. In this court the petitioners have filed the undertaking which was expected by the First Appellate Court.

5. The learned counsel for the petitioner has submitted that by keeping the construction incomplete utmost hardship and inconvenience would be caused to

the petitioner. It is then submitted that if the petitioners are permitted to complete the construction subject to the undertaking filed by them, it will not cause any prejudice to the plaintiff and other defendants.

6. Per contra the learned counsel appearing for the plaintiff and other defendants has submitted that it is apprehended that the petitioners may block the entry to the plaintiff's and other defendant's property which is in their respective possession. It is then submitted that if the entry is blocked then the plaintiffs and other defendants may not have acess to the property. The learned counsel for the petitioner has submitted that the petitioners will not obstruct the entry to the plaintiffs and other defendant's property by carrying out such construction in house no.430. I have no iota of doubt that pending decision of the suit, some arrangement has to be made having regard to the equities. I am also of the opinion that the First Appellate Court has declined to adjust the equities on account of failure on the part of the petitioners to submit the undertaking in writing. This being the position, I deem it appropriate to quash and set aside the order passed by the First Appellate Court and remand the matter for fresh decision in accordance with the law, and after

affording an oppoprtunity of hearing to the parties concerned.

5. In the result, the impugned order is quashed and set aside. The matter is remanded to the First Appellate Court for its consideration in accordance with the law and after taking into account the undertaking tendered by the petitioner in this court in the light of the observations made by me in this order.

6. It shall be open for the First Appellate Court to take into consideration the Commissioner’s report with a view to ascertain the genuineness of the apprehension of the plaintiff and other defendants that the construction may block their entry to their respective premises.

7. I hope and trust that the District Judge will decide the appeal as expeditiously as possible and preferably within a period of eight weeks from today. Both the learned counsel submit that their respective clients would appear before the District Judge on 4-10-2007. Hence further notice from the First Appellate Court to the respective parties are dispensed with. Rule made absolute in the above

terms.

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